



Polish Courts: A Threat to the Primacy of EU Law

By Andrew Draper

I. Background

The idea of the primacy of European Union Law over the laws of Member States began with the *Van Gend en Loos v. Nederlandse Administratie der Belastingen*¹ case. This case was heard before the European Court of Justice (“ECJ”).² The first of two questions that the ECJ addressed in the *Van Gend en Loos* case was “[w]hether Article 12 of the EEC Treaty has direct application within the territory of a Member State”³ This case involved a dispute over an import duty.⁴ A company named Van Gend en Loos imported a product into the Netherlands.⁵ A law ratified in the Netherlands on 25 July 1958 stated that the type of product being imported should receive an 8% import tax.⁶ The European Economic Community (“EEC”) Treaty, which went into force on 1 January 1958, stated that the type of product that Van Gend en Loos imported should receive only a 3% import tax.⁷ The ECJ had to determine if the EEC law should

¹ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 00001.

² *See id.* at ¶ 9.

³ *Id.* at page 3. The abbreviation “EEC” stands for the “European Economic Community.” *See id.* The European Economic Community was created in 1951. *History of the European Union 1945-1959*, EUR. UNION, https://european-union.europa.eu/principles-countries-history/history-eu/1945-59_en (last visited Jan. 27, 2022). The European Union (“EU”) is the successor to the EEC. *See Consolidated Version of the Treaty on European Union*, Feb. 7, 1992, 2012 O.J. (C 26) 10 at title 1, art. 1 [hereinafter *Treaty of the European Union*]. Because the EU is the successor to the EEC, this case can be considered as precedent.

⁴ *See Van Gend en Loos.* at ¶¶ 1-5.

⁵ *See id.* at ¶ 1.

⁶ *See id.* at ¶¶ 2, 4.

⁷ *See id.* at ¶ 5.

be placed above the law of Netherlands, one of the member states of the EEC.⁸

The *Van Gend en Loos* court answered clearly: the European Economic Community law took place above the law of the Member States. The Court stated that the “[European Economic] Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights,”⁹ The Court went on to say that the treaty that created the EEC “produces direct effects and creates individual rights which national courts must protect.”¹⁰ Not only did the creation of the EEC limit the rights of (previously) sovereign nations, but the EEC also forces Member State courts to uphold individual rights that are not found in Member State law. In short, *Van Gend en Loos* upheld the primacy of EEC law.

The Treaty of Lisbon reaffirmed the primacy of European Union Law over the laws of Member States.¹¹ It explained that “the Treaties and the law adopted by the [European] Union on the basis of the Treaties have primacy over the law of Member States”¹² The Treaty of Lisbon explains that case law helps support this position.¹³ The European Union (“EU”) is the direct successor to the EEC, and the EEC’s case law can be used as precedent for the EU.¹⁴

Despite EU law’s primacy over Member States, Member States can avoid the responsibilities of EU law by withdrawing from the EU.¹⁵ If a Member State chooses to

⁸ *See id.* at page 3.

⁹ *Id.* at page 12.

¹⁰ *Id.* at page 13.

¹¹ *See* Treaty of Lisbon: Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 at protocol A, § 17 [hereinafter Treaty of Lisbon]. The Treaty of Lisbon amended the Treaty of the European Union. *See id.* at page 3. It is relevant, however, to look at what was amended by the Treaty of Lisbon. The Treaty of Lisbon was a relatively recent (2007) amendment process that reaffirmed the primacy of EU law. *See id.* at protocol A, § 17.

¹² *Id.*

¹³ *Id.*

¹⁴ The European Economic Community was created in 1951. *History of the European Union 1945-1959*, *supra* note 3. The European Union (“EU”) is the successor to the EEC. *See* Treaty of the European Union, *supra* note 3 at title 1, art. 1.

¹⁵ *See* Treaty of Lisbon, *supra* note 11 at art. 49(A)(3) (stating that the EU “Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that,” after meeting certain notification of withdrawal requirements).

withdraw from the EU, they must notify the European Council.¹⁶ Notably, Member States are not required to obtain EU approval before withdrawing from the EU.¹⁷ Rather, they must “withdraw from the Union in accordance with its own constitutional requirements.”¹⁸

II. The Polish Constitutional Court Rejects the Primacy of EU Law

The Polish Constitutional Tribunal heard a case on the primacy of EU law over Polish law.¹⁹ This case arose out of a period of political tension both within Poland and between Poland and the European Union. In 2015, a nationalist party named Law and Justice (“PiS”) won a majority of the seats in the Polish legislature.²⁰ In 2018, PiS created a Disciplinary Chamber for judges from the Polish Supreme Court.²¹ The EU Commission launched an investigation out of fear that the Disciplinary Chamber undermined the judicial independence of Polish judges.²² In 2020, the European Court of Justice ordered Poland to suspend the Disciplinary Chamber, claiming that the Disciplinary Chamber was incompatible with EU law.²³ The Polish Constitutional Tribunal heard the case in question in light of the dispute regarding the Disciplinary Chamber.²⁴

The Constitutional Tribunal of Poland found that the Treaty of the European Union

¹⁶ *See id.* at art. 49(A)(2).

¹⁷ *See id.* at art. 49(A)(1).

¹⁸ *Id.*

¹⁹ Assessment of the Conformity to the Polish Constitution of Selected Provisions of the Treaty on European Union K 3/21, Constitutional Tribunal of Poland (Oct. 7, 2021), <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

²⁰ David Cameron, *EU Charges Poland’s Constitutional Tribunal with Violating EU law*, YALE MACMILLAN CENTER (Jan. 3, 2022), <https://macmillan.yale.edu/news/eu-charges-polands-constitutional-tribunal-violating-eu-law>.

²¹ *See id.*

²² *See id.* The Disciplinary Chamber Members are all Judges who are Selected by the National Council for the Judiciary. *Id.* One of the houses of the Polish legislature, named Sejm, selects the members on the National Council for the Judiciary. *Id.* The fear was that the Polish legislature could exert influence over the Polish courts through the legislature’s selection of members on the National Council for the Judiciary. *See id.*

²³ *See id.*

²⁴ *See id.*

violates the Constitution of the Republic of Poland.²⁵ The court’s judgment does not provide detailed legal reasoning of their decision.²⁶ However, the court succinctly explains their concerns regarding the primacy of EU law.²⁷ They believe that the ECJ’s interpretation of EU law has ensured that the Constitution of Poland “is not the supreme law of the Republic of Poland” and that “Poland may not function as a sovereign and democratic state.”²⁸ They also believe that the European Union has overstepped the authority given by Poland to the EU.²⁹

The court states that this is inconsistent with Articles 2, 8, and 90(1) of the Constitution of the Republic of Poland.³⁰ Article 2 states that “[t]he Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.”³¹ Article 8 states that the Polish “Constitution shall be the supreme law of the Republic of Poland” and that the Constitution shall apply unless provided otherwise in the Constitution.³² Article 90(1) allows Poland to grant to international groups “the competence of organs of State authorities in relation to certain matters.”³³

III. Impact on the EU

It is unclear how this decision will impact both Poland’s place in the EU and the EU as a whole. The EU is limited in its ability to respond. Although the Treaty of the European Union

²⁵ See Assessment of the Conformity to the Polish Constitution of Selected Provisions of the Treaty on European Union K 3/21, Constitutional Tribunal of Poland (Oct. 7, 2021), <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

²⁶ See *id.*

²⁷ See *id.*

²⁸ *Id.* at 1(b-c).

²⁹ See *id.* at 1(a).

³⁰ See *id.* at 1.

³¹ Poland’s Constitution of 1997 with Amendments through 2009, CONSTITUTE PROJECT at art. 2, https://www.constituteproject.org/constitution/Poland_2009.pdf?lang=en [hereinafter Poland’s Constitution].

³² See *id.* at art. 8.

³³ *Id.* at art. 90(1).

allows for Member States to withdraw from the EU,³⁴ there is not a provision that allows the EU to forcibly remove Member States.³⁵ The EU's other option, imposing financial penalties, has not worked. On October 27, 2021, the European Court of Justice ordered Poland to pay one million Euros in fines for each day that it refused to comply with the ECJ's previous order.³⁶ The threat of financial sanctions has not yet pressured Poland into compliance with the ECJ's previous order.³⁷ The final option to force Poland's compliance is to use Article 7 of the Treaty of the European Union to remove Poland's EU voting rights.³⁸ Again, this is not an option that presents an efficient solution to Poland's noncompliance. Poland and Hungary have been subjected to Article 7 proceedings for years without any significant progress.³⁹

Without a way to force Poland's compliance, the European Union is stuck. The EU's authority has been repetitively questioned over recent years. The United Kingdom voted to leave the European Union in 2016, and their departure became official on January 1, 2021.⁴⁰ In May of 2020, the Constitutional Court of Germany ruled that an EU bond-buying program was illegal under Germany without certain specifications.⁴¹ In their decision the Constitutional Court of Germany explicitly rejected the precedent of a 2018 Court of Justice of the European Union

³⁴ See Treaty of the European Union, *supra* note 3 at art. 50 ("Any Member State may decide to withdraw from the Union in accordance with its constitutional requirements").

³⁵ See generally *id.*

³⁶ See Cameron, *supra* note 20.

³⁷ Poland is still criticizing EU actions as infringements on Polish sovereignty. See *EU Takes Legal Action Against Poland over Rule-of-Law Dispute*, AL JAZEERA, (Dec. 22, 2021), <https://www.aljazeera.com/news/2021/12/22/eu-takes-legal-action-against-poland-over-rule-of-law-dispute>.

³⁸ See Treaty of the European Union, *supra* note 3 at art. 7.

³⁹ Simon van Dorpe, *Explained: What Bombshell Polish Court Ruling Means for EU*, POLITICO (Oct. 8, 2021), <https://www.politico.eu/article/explained-poland-court-ruling-european-union-eu/>. Poland and Hungary have been able to protect each other from the EU being able to remove voting rights. See *EU Takes Legal Action Against Poland over Rule-of-Law Dispute*.

⁴⁰ *Brexit: What You Need to Know about the UK Leaving the EU*, BBC NEWS (Dec. 30, 2020), <https://www.bbc.com/news/uk-politics-32810887>.

⁴¹ Hans von der Burchard, *Brussels Closes Case against Germany in EU Law Supremacy Dispute*, POLITICO (Dec. 2, 2021), <https://www.politico.eu/article/brussels-closes-case-against-germany-in-eu-law-supremacy-dispute/>.

(“CJEU”) decision.⁴² In September of 2021, former EU Brexit negotiator and former French presidential candidate Michel Barnier called for France to regain its “legal sovereignty in order to no longer be subject to the judgments” of the CJEU.⁴³ In October of 2021, the Constitutional Court of Poland questioned the authority of EU law.⁴⁴ Of the 28 members of the EU in 2020 (prior to the United Kingdom’s exit), the third most populated Member State left the European Union and the first and seventh most populated Member States have challenged EU primacy.⁴⁵

The EU has weathered many storms,⁴⁶ but the number of powerful European nations strongly questioning the role of the EU is concerning. The EU is premised on the idea of Member States achieving common goals.⁴⁷ Practically speaking, this is difficult to achieve when Member States disregard the authority of the EU. Even if Poland’s conflict with the EU is resolved amicably, we have entered an era where Member States who disagree with actions taken by the EU or one of its subsidiaries do not use their voting powers to effectuate change. Rather, they seek to circumvent the EU by declaring the provision or decision in question inapplicable and contrary to the Member State’s laws. This is dangerous for the future of the EU. If the EU is to withstand future bouts of Member State dissent, they must make the process to remove voting rights for a Member State quicker and easier. If disregard of EU law is swiftly met with the removal of voting rights, then Member States may be more willing to follow EU

⁴² Matthew Karnitschnig, *German Court Lays Down EU Law*, POLITICO (May 5, 2020), <https://www.politico.eu/article/german-court-lays-down-eu-law/>.

⁴³ Paul Dallison and Elisa Braun, *Barnier the Brexiteer? French Candidate Gets Tough with EU on Campaign Trail*, POLITICO (Sept. 9, 2021), <https://www.politico.eu/article/michel-barnier-brexit-france-candidate-eu-campaign-trail/>.

⁴⁴ See Assessment of the Conformity to the Polish Constitution of Selected Provisions of the Treaty on European Union K 3/21, Constitutional Tribunal of Poland (Oct. 7, 2021), <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

⁴⁵ *Population on 1 January*, EUROSTAT (last visited on Jan. 30, 2022), <https://ec.europa.eu/eurostat/databrowser/view/tps00001/default/table?lang=en>.

⁴⁶ Wallace J. Thies, *Is the EU Collapsing?*, 14 INT’L STUD. REV. 2, 225, 227 (June 2012) (stating that “every decade since the creation of the Common Market in the 1950s has witnessed repeated claims that the EU (or one of its predecessors) was either dying or about to collapse. None of these claims has been proven true, at least not yet”).

⁴⁷ See Treaty of the European Union, *supra* note 3 at art. 1.

decisions out of fear of losing the ability to participate in EU decision making. Practically speaking, a state that disagrees with a decision would want to protect their power to influence future decisions, not lose the power to influence future decisions. Without this change, more powerful Member States can disregard EU decisions or even threaten to leave EU in order to force the EU to comply with the Member States' demands while still voting in EU matters. Power currently weighs in favor of Member States, and the EU needs to take some of that power back to ensure the survival of the EU.